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March 29, 2005 VIA – Email

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

RE: Release Nos. 34-50980; IA-2340; **File No. S7-25-99**

Dear Mr. Katz:

The Mortgage Institute for Financial Services Professionals, Inc. ("MIFSP") (www.MIFSP.org) appreciates the opportunity to file additional comments on the rule defining the fair application of regulations under the Investment Advisers Act of 1940 ("Advisers Act"), more specifically, the Reproposed Rule, Section 202(a)(11)-1 under the Act entitled "Certain Broker-Dealers Deemed Not To Be Investment Advisers". MIFSP first filed comments on February 9, 2005, but believes there are issues that warrant further comment and we request that the Commission consider these comments to be timely filed, as we will keep our comments brief.

MIFSP provides training to financial planners and others in the financial services industry in the provision of residential mortgage planning and advisory services. Our interests in this matter concern consumer issues of investment suitability, the inadequacy of existing and reproposed disclosures, the differentiation of brokerage, advisory and financial planning accounts and services, and the definition of "solely incidental to".

The MIFSP believes that by focusing on four key areas the Commission will be able to develop meaningful and at least adequate investor protection safeguards that effectively balance various competing interests without creating an undue burden on or for the Commission in terms of effective monitoring and enforcement.

"Solely Incidental To" Brokerage Business Should Be Limited To Advice That Would Reasonably Accompany The Brokerage Suitability Analysis

We agree with the Commission that "fee based brokerage has the potential to provide significant benefits to brokerage customers" and that "broker-dealers should be permitted to offer both full-service and discount brokerage services without triggering application of the Advisers Act." However, we disagree with the Commission that broker-dealers can offer "advisory services as part of the traditional package of brokerage services" without qualification or limitation and not be subject to the Advisers Act.

While we recognize and appreciate the Commission's attempt to qualify, limit or characterize "solely incidental to" within the meaning of Section 202(a)(11)(C) with terms like "in connection with" and "reasonably related to", these terms don't go far enough in differentiating either the levels or quality of advisory services or in making clear distinctions between when an account is an exempt brokerage account and when it is an advisory account. Yet, we also recognize, as does the Commission that broker-dealers have always offered and promoted "ancillary services such as advice" and are required by their status as a broker-dealer to determine brokerage suitability. Thus, we understand that the Commission must allow for "some" advice in recognizing that a broker-dealer has obligations to determine suitability.

In consideration of the Commission's stated concerns, MIFSP recommends that "solely incidental to" be limited to advice that would reasonably accompany the performance of the brokerage suitability analysis. Such an interpretation not only takes into consideration the Commission's concerns regarding interfering with the brokerage suitability analysis, but limits broker-dealers from having a competitive advantage over others and eroding investor protections while at the same time enjoying the exception.

Financial Planning As Not Solely Incidental to Brokerage Services Should Include Any Terms Or Titles That Reasonably Imply A Broker-Dealer Is Holding Itself Out As A Financial Planner Or As Providing Financial Planning Services

MIFSP supports the Commission's interpretation regarding financial planning as a good start in addressing issues surrounding some broker-dealers promoting financial planning as a way of acquiring the confidence of customers to promote their brokerage services or package of services without actually providing any meaningful financial planning. We recommend that your interpretation not be limited to circumstances where there is a separate contract or those instances where a separate fee is charged for financial planning. We would reasonably expect that under those circumstances the broker-dealer would be deemed to be an adviser.

Recognizing that there is wide variation in the quality of services a customer receives under the guise of "financial planning" and there is both a wide variation in the credentials of those persons providing the advisory services that maybe subject to the Advisers Act and the titles those persons may carry and use (e.g., financial consultant, financial advisor, wealth planner, financial engineer, investment planner, etc.), investor confusion and provider misrepresentations are bound to persist and customer complaints will likely escalate. Therefore, MIFSP agrees with the Commission's recognition that broker-dealers "often play substantially different roles from investment advisers and in such roles they should not be held to standards to which advisers are held" but we "believe that broker-dealers and advisers should be held to similar standards depending not upon the statute under which they register, but upon the role they are playing."

The MIFSP also recommends that maintaining clear separation between financial planning services subject to the act and exempt brokerage services can diminish potential problems, regardless of the title or credentials of the person providing the services, as

there are any number of entities that engage in financial planning that are not subject to the Commission's authority. The ideal is to limit, if not eradicate, fraud wherever it may exist and ideally the Commission would be helping all entities concerned by simply requiring a separate contract in line with the statute of frauds and/or a separate fee for financial planning or advisory services, thus creating a clear distinction to and for investors.

Additionally, since there are numerous terms and titles used in the contemporaneous market to express or imply that persons are financial planners and/or providing financial services we recommend that the Commission broaden its interpretation to include the use of any terms or titles that reasonably imply that a broker-dealer is holding itself out as a financial planner or as providing financial planning services as being inconsistent with the exception.

Advisory Service As Package of Brokerage Services Should Not Extend Beyond That Which Would Reasonably Accompany The Brokerage Suitability Analysis

MIFSP recognizes the Commission's belief that when a broker-dealer offers advisory services as part of the traditional package of brokerage services, it ought not to be subject to the Advisers Act merely because they "re-price" those services. However, as the Commission acknowledges, the potential exists for differing levels of "advisory services" for fee-based accounts over commission-based accounts and for differing levels of "advisory services" for commission-based or fee based accounts depending upon the extent of trading or the amount of assets held in the accounts. With this acknowledgement the Commission must recognize these differing levels of advisory services most likely will result in broker-dealers providing advisory services that extend beyond what could reasonably be considered "solely incidental to brokerage services", even though it may be nondiscretionary advice.

Once the level of advisory services extend beyond that which is solely incidental to brokerage services, it should be considered to be inconsistent with the exception. Even though one of the aims of the Tully Committee was to create incentives for brokers to improve the "quality" of the advisory services provided their customers, it does not follow that improved quality connotes expansion of advisory services beyond those solely incidental to brokerage services.

MIFSP believes that the Commission must consider differences in the nature of services provided as being very relevant to its consideration in deciding whether to adopt the rule. If the nature of the services is not related to advisory services, then it's MIFSP's position that such services are not inconsistent with the exception. However, whether provided as packaged services or not, advisory services that extend beyond that which would reasonably accompany the performance of the brokerage suitability analysis should be considered to be inconsistent with the exception.

Suitability Is Implied But Not Defined Under The Advisers Act

The question of suitability is implied under the Investment Advisers Act in that an investment adviser is held to a fiduciary standard. The standard can vary depending on the registration status of the adviser, federal or state, and then vary by state; however it is generally held that a fiduciary owes a duty of undivided loyalty to their clients and must deal fairly and honestly with them, and thus requires full and fair disclosure among other duties such as acting in good faith and exercising reasonable care to avoid misleading their clients, e.g., investing money for the client's benefit and not the advisers personal gain.

Part of the problem stems from the fact that neither "solely incidental to" nor "brokerage suitability" are defined under the Advisers Act. As stated previously, MIFSP recommends that when it comes to advice "solely incidental to a brokerage account", the advice should be limited to that which is necessary in determining "brokerage suitability." Therefore, in further interpreting "solely incidental to", we also recommend that "brokerage suitability analysis" be adequately and appropriately defined.

We suggest that brokerage suitability revolves around what a broker-dealer currently applies in determining the appropriateness of any investment relative to a particular customer and may include reviewing a customer's available capital, financial needs, investment objectives, and the customer's financial ability to assume the risk associated with the proposed investment. Thus, a broker-dealer, in determining brokerage suitability, may collect and review some of the same customer information and perform some of the same analysis as a financial planner. The difference is in what the customer is provided.

The line should be drawn at what the customer is provided in the form of advice. If a broker-dealer uses the information and analysis to provide the customer a financial plan (no matter how skimpy), whether oral or written, or to provide financial planning advice, it should not be exempted from the Advisers Act. MIFSP believes this interpretation will provide a redline distinction that is clear to the investor and the provider. Codifying the interpretation of brokerage suitability and "solely incidental to", as recommended by MIFSP, will curtail investor confusion and provider misrepresentation.

While it's true that a broker-dealer maybe subjected to dual registration (registration with an SRO and the SEC) only the SEC has enforcement and administrative jurisdiction over a broker-dealer in connection with the Advisers Act[1]. So while a broker-dealer maybe subject to NYSE Rule 405, "Know Your Customer" Rule[2], or similar standards generally

[1] The SEC pointed out that many commenters opposed the proposed rule assumed that client's of advisers received substantially more protections from federal securities laws than do customers of broker-dealers. The SEC acknowledges a difference in the regulatory framework and contends that Congress was well aware of these differences. The bottom line being that the differences on which many commenters focused may not be as great as they asserted. B/D are subject to extensive oversight by the Commission rules, and SRO rules provide substantial protections for B/D customers that in many cases are more extensive than those provided by the Advisers Act and the rules there under.

[2] It's meaning is also expressed in Article 3 of the NASD Rules of Fair Practice: "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for

determined by each broker-dealer, (all SROs have a similar regulation which states that it is the job of the broker-dealer, principal, etc., to learn as much as possible about the customer so as to determine suitability and it is the customer's responsibility to supply requested information that satisfies the suitability or know your customer requirements) there are no such requirements under the Advisers Act; and the SROs have no jurisdiction over a broker-dealer's investment advisory business. This results in a major gap or loophole that the Commission can easily close within the proposed framework.

Creating Adequate Customer Disclosures And Determining Suitability In The Contemporaneous Market

While we appreciate the Commission's position and recognition that fee based brokerage accounts are not suitable for all broker-dealer customers[3] and while MIFSP generally supports the reproposed [4] rule, we believe that it doesn't go far enough in protecting the interest of investors and in exposing conflicts of interest that generally exist in the contemporaneous marketplace.

As the Commission wrestles with a regulatory framework that is more than sixty years old, investors don't realize just how vulnerable they are in our contemporaneous society filled with functional and technological innovations. Couple this vulnerability with the lack of clearly defined elements involving the question of brokerage suitability and we could have a recipe for calamity. There have been many comments in regard to the fiduciary standards of the registered investment adviser and the suitability standards of broker-dealers. However, there has been little focus on brokerage suitability itself. So while it's relevant to argue what advisory services are significant and whether one service is more important than another in a package of brokerage services, we believe parties on all sides of the issue can agree that brokerage suitability is a common element that pertains to both brokerage and advisory accounts in order to afford brokerage customers the greatest investor protections.

Accordingly, MIFSP must bring to the Commission's attention a major flaw in the existing retail brokerage and investment advisory market and in the regulatory oversight and guidance that has been inadvertently, but consistently overlooked by the Commission, SROs, broker-dealers, investment advisers, financial planners, and even academia. This flaw pertains to the determination of suitability in the blending of mortgage and investment advice. To demonstrate the flaw, we offer the following

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believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and to his financial situation and needs."

[3] SEC acknowledges that investors with large cash positions or investments in mutual funds (for which a customer may pay multiple fees) may wish to avoid them. NASD issued notice to members in 11-2003 identifying these conflicts and that members should have supervisory processes in place to review whether fee-based brokerage accounts continue to be appropriate.

[4] Rule 202(a)(11)-1(a) that a B/D satisfy three conditions: (i) The broker not have discretionary authority over the account, (ii) Investment advice be solely incidental to the brokerage services provided to the account; and (iii) advertisements, agreements, contracts, etc. must contain prominent disclosures including a statement that an account is a brokerage account and not an advisory account.

scenario, an investor asks either an investment advisor or a registered representative a rather basic question: Where should I apply my discretionary funds, (a) toward prepaying my mortgage or (b) toward an investment?

It is commonly recognized that a home is the primary store of wealth for most consumers, however, being that the home is an exempt security, financial advice on the home escapes the scrutiny of the Securities & Exchange Commission, the National Association of Securities Dealers, and the Federal Reserve Board. When answering the kind of question posed here, the financial adviser does not have to document the suitability of the recommendation. The fact that no rules or regulations exist to protect the investor from investment advisers who may inappropriately recommend that investors pull out the wealth (equity) found in their homes, and use that wealth (mostly putting it at much greater risk) to make investments elsewhere without any determination of suitability has resulted in the proliferation of such advice and advice givers and has lead to the potential exploitation of this pocket of consumer wealth.

With broker-dealers and/or investment advisers getting into the market as mortgage lenders and/or mortgage brokers and loan officers, there has been a significant increase in business models where the mortgage (brokerage/lender) side feeds off of the investment side and vice versa. These kinds of business models result in an inherent conflict of interest for the investment adviser and in a growing opportunity for fraud and misrepresentations on the part of the adviser, even if it's committed inadvertently or spawned out of ignorance.

Some in the financial services industry pass on to consumers ill conceived and illogical residential mortgage advice in hopes of reaping a profit from a mortgage transaction, the sale of a financial product, or from asset management fees. Consumers need clear and adequate disclosure of the risks they are assuming and of any conflicts of interest the broker-dealer (investment adviser are required to disclose) may have. To better protect investors and keep the markets fair, investment advisers and registered representatives need to be better educated and sensitized to the potential devastation Americans will face when and if their investment-mortgage advice backfires.

When comparing an investment to prepaying the mortgage, some well-meaning investment advisers and academics suggest that a consumer just compare the debt rate of the mortgage to the potential return on the investment and go with the higher rate[5]. This type of advice is most often given without any mention or recognition of the risk differentials to say the least or of the potential pitfalls in investing "other people's money", which is what the mortgage represents. We believe there is an inherent conflict that should be disclosed to the consumer, when this kind of advice is given by one who is providing the consumer both mortgage services and investment advisory services or who holds an interest in companies that are providing both kinds of services to the customer. An example of how a registered investment adviser and a broker-dealer may promote this kind of mortgage advice with or through a third company can be found in the Thornburg

[5] http://www.mifsp.org/page/page/838566.htm MIFSP White Paper

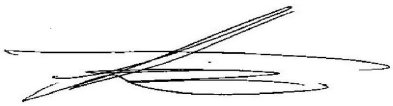
Mortgage[6] model. Thornburg Mortgage, a national sponsor of the Financial Planning Association, is one of three Thornburg Companies. The other two companies are Thornburg Investment Management (an RIA) and Thornburg Securities Corporation[7] (an NASD Broker-Dealer). Thornburg Mortgage (which is neither a RIA or a broker-dealer) actively promotes their pledged asset loan program to financial planners as a way to maximize assets under management[8] and to build their practice[9].

There are many other companies[10] like Thornburg that actively promote cash-out refining and home equity loans for purposes of making investments. What should concern the Commission is that there are no requirements for determining suitability when advising an investor to access home equity through a cash-out refinance, a home equity line of credit or loan, or a zero down loan for purposes of making investments or maintaining assets under management. There are no requirements for disclosure of the differential in risks and objectives between a mortgage loan on the primary residence and the investment (we will not go into the inadequacy of disclosures in regards to pledged asset loans/mortgages that are subject to collateral calls and liquidation).

With the advent of more and more of these type business models, consumers will find themselves and their "store of wealth" at greater risk. Therefore, MIFSP asks the Commission to conduct a special study to explore the need to further define suitability in light of these types of business models, to require disclosure of the risk differentials between the mortgage and the investment, to require disclosure of any conflicts of interest, and to determine if any additional investor protections are warranted.

Again, MIFSP thanks the Commission for the opportunity to comment on these matters and we look forward to assisting the Commission in any way that it deems appropriate.

Sincerely,



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[6] http://www.fpanet.org/member/membership/corporate/natlsponsors.cfm
[7] http://www.thornburginvestments.com/about/people.asp
[8] http://www.thornburgmortgage.com/FinancialPlanners/Index.aspx
[9] http://www.thornburgmortgage.com/pdfs/MortgageMattersPDF/MortgageMattersSummer2004.pdf
[10] http://www.thornburgmortgage.com/pdfs/MortgageMattersPDF/Mortgage%20Matters%20Summer%202002.pdf